

**COURT OF APPEALS  
DECISION  
DATED AND RELEASED**

**NOTICE**

July 1 , 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

**No. 97-1148**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

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**IN RE THE TERMINATION OF PARENTAL RIGHTS OF  
TYLER J., A PERSON UNDER THE AGE OF 18:**

**STATE OF WISCONSIN,**

**PETITIONER-RESPONDENT,**

**v.**

**JESSE S.,**

**RESPONDENT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Outagamie County: JAMES T. BAYORGEON, Judge. *Affirmed.*

CANE, P.J. Jesse S. appeals a judgment terminating his parental rights to Tyler J. Jesse contends the evidence was insufficient for the jury to conclude the Outagamie County Department of Human Services exercised a diligent effort to provide court-ordered services to him, on the grounds that the

County failed to provide him with sufficient guidance in meeting court-ordered conditions, and that the trial court erred by concluding that termination of his parental rights was in Tyler's best interests. He also asserts that the trial court erred by failing to adjourn proceedings to allow the County to investigate a possible placement for Tyler with Jesse's family. Therefore, Jesse argues, the court's failure to adjourn proceedings is a basis to set aside the TPR order.

This court concludes that there is sufficient evidence to support the jury's verdict that the County made a diligent effort to provide court-ordered services to Jesse as required by § 48.415(2)(b), STATS., and that an alleged failure to adjourn proceedings to investigate Jesse's family as a possible placement is not a basis to overturn TPR proceedings. The judgment is therefore affirmed.

Tyler was born November 16, 1993, and has been in foster care continuously since January 1996, pursuant to a CHIPS order. Jesse is Tyler's natural father. At the time Tyler was placed in foster care, the trial court imposed the following conditions upon Jesse:

1. Jesse will obtain an appointment for a psychological evaluation through a mental health clinic and cooperate with the recommendations of the Psychologist. If that recommendation includes additional counseling, he will develop a written treatment plan with a licensed mental health practitioner, successfully complete the treatment plan and provide a copy of the plan to the social worker. Successful completion will be determined by the therapist.
2. Jesse will obtain an appointment for a drug and alcohol abuse assessment and cooperate with the AODA counselor during the assessment and in developing a written treatment plan providing a copy to the social worker and successfully complete the treatment plan.

Successful completion will be determined by the AODA practitioner.

3. Jesse will successfully complete a Parent Education class, such as the Nurturing Program as provided by the OCDHHS. Success in this area will be demonstrated by a report from the facilitator of the class that Jesse did attend all classes and successfully completed the program.
4. Jesse will establish a home environment that is safe and appropriate for Tyler, including a means of financially supporting Tyler in this home environment. Success in this area will be demonstrated by consistent and appropriate conditions of the home when checked by any assigned staff working with the family at the time.
5. Jesse will be responsible for scheduling visits with Tyler at least one week in advance of the visit. These visits will continue to be supervised until Jesse has had twelve consecutive successful visits. The successfulness of the visitations will be determined by the social worker.

It is undisputed that Jesse failed to meet these conditions for Tyler's return. Jesse visited successfully with Tyler seven times from the time Tyler was taken into foster care under the CHIPS order in January until Jesse's parole was revoked in May. Following Jesse's incarceration on new charges, the County petitioned the court for termination of Jesse's parental rights to Tyler. Jesse did not consent to the termination, and his request for a jury trial was granted. The jury returned a verdict stating that the County made a diligent effort to provide Jesse with court-ordered services, that Jesse had failed to demonstrate substantial progress toward meeting the conditions established for Tyler's return, and that there was a substantial likelihood that Jesse would fail to meet those conditions in the future. The court confirmed the verdict and issued an order terminating Jesse's parental rights.

## I. DILIGENT EFFORT

Under § 48.415(2), STATS., the County must show by clear and convincing evidence that the “agency responsible for the care of the child and the family has made a diligent effort to provide the services ordered by the court” to show a continuing need of protection or services as a ground for terminating parental rights. *See In re Baby Girl K.*, 113 Wis.2d 429, 441, 335 N.W.2d 846, 852 (1983). Section 48.415(2)(b)1 further provides that “‘diligent effort’ means an earnest and conscientious effort to take good faith steps to provide the services ordered by the court which takes into consideration the characteristics of the parent or child, the level of cooperation of the parent and other relevant circumstances of the case.” The jury was instructed in this case that a “‘diligent effort’ requires an earnest and conscientious effort in which the agency must take good faith steps to provide the services ordered by the Court.”

Whether the County made a diligent effort to provide court-ordered services is a fact-sensitive inquiry that must consider the totality of the circumstances of each case. *See State v. Raymond C.*, 187 Wis.2d 10, 15, 522 N.W.2d 243, 245 (Ct. App. 1994). Here, the County’s efforts to provide Jesse with court-ordered services must be examined in light of the jury verdict. When determining the sufficiency of the evidence to support a jury verdict, this court defers to the jury’s determinations. It will not change those determinations if any credible evidence, and reasonable inferences that may be drawn from that evidence, supports the verdict. *See Ferraro v. Koelsch*, 119 Wis.2d 407, 410-11, 350 N.W.2d 735, 737 (Ct. App. 1984), *aff’d*, 124 Wis.2d 154, 368 N.W.2d 666 (1985); § 805.14(1), STATS. “Before a reviewing court will reverse, there must be ‘such a complete failure of proof that the verdict must have been based on speculation.’” *See Finley v. Culligan*, 201 Wis.2d 611, 631, 548 N.W.2d 854, 862

(Ct. App. 1996) (quoting *Nieuwendorp v. American Family Ins. Co.*, 191 Wis.2d 462, 472, 529 N.W.2d 594, 598 (1995)).

Here, the jury's finding that the County made a diligent effort to provide court-ordered services is supported by a reasonable view of the evidence. Several County employees testified at trial, including Jesse's probation agent and parole officer, Michelle Seehafer, who testified that Jesse was unwilling to undergo an alcohol and drug assessment. Seehafer also testified that Jesse freely admitted to her that he had used cocaine, marijuana, and alcohol several times since the court imposition of conditions for Tyler's return. She further testified that, to her knowledge, Jesse had never attended a parenting class and that Jesse had not lived in a place she would consider appropriate for Tyler since January 1996 until his parole was revoked in May.

The home consultant assigned to work with Jesse, Beatrice Thompson, testified that she had offered to arrange for a volunteer driver to transport Jesse from his home in Green Bay to visit Tyler in foster care in Appleton in order to make it easier for Jesse to visit his son, but that Jesse had refused to give her an address where he could be picked up.

Sandra Blumers Doxtater, the social worker assigned to Jesse's case, testified that she had explained the court-ordered conditions and the termination warnings to Jesse. Doxtater further testified that Jesse did not complete twelve visits with Tyler, and that he had attempted to conceal his incarceration and revocation of parole from her until mid-May, when she called Seehafer to ask where Jesse was. Jesse himself admitted in his testimony that he had not met the court-imposed conditions for Tyler's return, and that he was incarcerated pending hearing on new charges.

Based on Jesse's admission, and the testimony of Seehafer, Thompson and Doxtater, this court is satisfied that the evidence credibly supports a finding that the County made a diligent effort to provide court-ordered services to Jesse, and that Jesse did not meet the conditions for Tyler's return. This court is also satisfied that based upon Jesse's current incarceration pending a hearing on new charges, a jury could reasonably infer that there was a likelihood that Jesse would be unable to meet those conditions in the future.

## II. EXERCISE OF DISCRETION

Next, Jesse argues that the trial court erroneously exercised its discretion in determining it was in Tyler's best interests to terminate Jesse's parental rights and sever the child's ties with Jesse's family, in order to allow the County to investigate Jesse's family as a possible placement for Tyler. This court disagrees.

A court exercises discretion when it considers the facts of record and reaches a rational and legally sound conclusion through reason. *See Burkes v. Hales*, 165 Wis.2d 585, 590-91, 478 N.W.2d 37, 39 (Ct. App.1991). In *Burkes*, we examined the scope of our review of a trial court's discretionary ruling:

[T]o determine whether the trial court properly exercised its discretion in a particular matter, we look first to the court's on-the-record explanation of the reasons underlying its decision. And where the record shows that the court looked to and considered the facts of the case and reasoned its way to a conclusion that is (a) one a reasonable judge could reach and (b) consistent with applicable law, we will affirm the decision even if it is not one with which we ourselves would agree.

*Id.* at 590, 478 N.W.2d at 39 (footnote omitted).

This court has also stated that “[b]ecause the exercise of discretion is so essential to the trial court’s functioning, we generally look for reasons to sustain discretionary decisions.” See *Schneller v. St. Mary’s Hosp.*, 155 Wis.2d 365, 374, 455 N.W.2d 250, 254 (Ct. App. 1990), *aff’d*, 162 Wis.2d 296, 470 N.W.2d 873 (1991).

Jesse supports his contention by pointing out that no adoptive home was chosen for Tyler at the time of the termination proceedings, and argues that the County had no basis for its conclusion that there would be no harm in severing the father-son relationship.

The trial court responded:

This hearing is not about Jesse [S.]. It’s not about [the mother of Tyler]. It’s not about the family. It’s about Tyler [J.] and his interest, his future. And this has been going on now, actually going back from ’93 with the first contacts with the Department of Social Services. Legal proceedings have been going on for a year. They have to come to a conclusion. There has to be some stability placed into Tyler’s life. He hasn’t had that until this day. And to continue this and go on and on and on would simply deny him the right to have stability, wherever that may be, in whatever home that might be. That’s not the issue I’m determining now.

What I’m going to do now, hopefully, is open the door so he can get some stability in his life, so that he can be somewhere where he’s not going to have to worry about being moved next month or the month after, or someone not coming back, or someone being there and not taking care of him. For Tyler, those days should be in the past. I think we have to try, and at this point come to some conclusions, and consider what is in his best interests, and hopefully accomplish that.

There is no question that the trial court reasonably exercised its discretion here. It considered the facts of record and applicable law and arrived at its decision through use of reason. Because the court’s decision is both reasonable

and consistent with the facts of record and applicable law, it meets the criteria to sustain a trial court's discretionary decision. The judgment terminating Jesse's parental rights is therefore affirmed.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.

